

CITATION: *Loone v Scott* [2007] NTMC 077

PARTIES: KYLEE LOONE
Appellant/Applicant

v

CATHERINE SCOTT
Respondent

TITLE OF COURT: LOCAL COURT (NT)

JURISDICTION: Darwin

FILE NO(s): 20729116

DELIVERED ON: 1 November 2007

DELIVERED AT: Darwin

HEARING DATE(s): 30 October 2007 & 1 November 2007

JUDGMENT OF: Ms M Little SM

CATCHWORDS:

RESIDENTIAL TENANCIES ACT – Appeal against decision of Commissioner of Tenancies lodged – Application for suspension of Order pending finalisation of appeal – ss 150, 152 – *Residential Tenancies Act (NT)*

REPRESENTATION:

Applicant in person
Respondent through Agent

Judgment category classification: B
Judgment ID number: [2007] NTMC 077
Number of paragraphs: 18

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20729116

[2007] NTMC 077

BETWEEN:

KYLEE LOONE
Appellant

AND:

CATHERINE SCOTT
Respondent

REASONS FOR DECISION
(Delivered as an Oral Decision)

Ms M Little SM:

1. This is an application for a stay or suspension of the Orders that the Commissioner of Tenancies made on 16 October 2007. An appeal has been lodged against the Orders. No grounds for appeal have been given. This is not unusual in this jurisdiction and it is quite possibly the norm. The appeal, pursuant to s 150 of the *Residential Tenancies Act*, is an appeal de novo under s 150(2), so grounds of appeal are not always going to be relied upon.
2. The issue raised by the appellant tenant is that she needs more time to find alternative accommodation. She was frank with the Court from the outset about this issue. This is also outlined in her affidavit which I will set out later. The lodging of the appeal and the consequential application for the stay of the Order pending the appeal was purely and simply to allow her more time to find other accommodation and to leave the premises. Indeed, I think it is open for the Court to find that she was seeking a stay of the Order and therefore appealed so that she had the opportunity of seeking that stay.

3. An appeal may be lodged by either party and it is not for the Registry to question the motives of the person lodging the appeal. Providing the appropriate documentation is lodged with the appropriate fee, the appeal is to be received by the Local Court Registry, given a Local Court file number and a pre-hearing conference date.
4. In this case, file 20729116 is listed for a pre-hearing conference on 3 December 2007. If it does not settle or is not finalised at that time, a hearing date will be fixed for the appeal. The appellant tenant is prosecuting the appeal and the onus is on her to conduct her appeal. If she does not discharge the onus, the appeal will be dismissed and costs can be awarded in this jurisdiction.
5. There are two Orders which are being appealed. Order 1 is the Order which the appellant is concerned about, the Order for the vacant possession of the property. Order 2 is for the payment of the rent owing and is not seriously being contested even though it has been appealed. If a stay is not granted, Order 1 will come into effect and the appeal on Order 1, in a very practical sense, will be a theoretical debate. It could well be later argued that the tenant should be allowed to resume her tenancy if her appeal is successful.
6. The appellant is entitled to appeal, that is abundantly clear and her motives for the appeal are not relevant to the appeal itself, but they are relevant to the question of a stay application which has been lodged as a consequence of the appeal. Section 152 of the *Residential Tenancies Act* is the relevant section and as relates to this case, subsection (1) sets out if an Order of the Commissioner has been appealed and the Court is satisfied an appeal has been commenced, the Court *may* suspend the operation of the Order until the determination of the appeal.
7. I am satisfied an appeal has been commenced. That has also been served on the respondent landlord and they have attended both the hearing on 30 October 2007, the hearing of the stay application and also attended here

on 1 November 2007. The Court then has discretion whether to suspend the operation of the Order until the appeal is determined. The power is clear acknowledgement of the fact that in cases where vacant possession is ordered by the Commissioner, a suspension of the Order is a way of ensuring that the outcome of an appeal is not rendered nugatory by action taken to remove the tenant pending the appeal.

8. It is similar to a bail application pending an appeal of a short sentence of imprisonment or to the lifting of a s 20A suspension of a drivers licence pending the hearing of a drink driving matter. The power is discretionary. The Court may suspend the operation of the Order, that discretion must be exercised judicially. I am not aware of any cases which guide the Court as to how this discretion is to be exercised.
9. The affidavit in support of the stay application by Ms Loone clearly sets out the reasons for the review of the Commissioner's decision. She states, in part "due to the high need of houses and the price of rentals, we have not been able to secure another premises; therefore, I am requesting the decision to be reviewed". That is the evidence of the applicant on her stay application.
10. There are two key issues which go to the question of the exercise of the discretion in this case. The appeal has been lodged as a device to buy time to stay longer in the property. Secondly, the tenant consented to the Order of the Commissioner. This latter issue is not a minor or trivial consideration. The tenant is now challenging an Order that she agreed to.
11. I am grateful to Mr Abaysekara, from Northern Territory Legal Aid, who attended without notice on a duty solicitor basis, part-way through the stay application after being called by the Court. He was able to raise an issue that had not been raised before, in that the tenant believed that there may have been a defect with the documents, which may have given her an arguable point on appeal. This related to a date of a signature of a

landlord's agent. This issue was raised before the Commissioner and did not affect the decision of the Commissioner. I do not regard the notice by the landlord to the tenant as challengeable; the question of the service of the notice is the key issue. Service of the notice was given.

12. There is no challenge to any relevant factor in the case. I have not been pointed to anything to justify the appeal being successful. I cannot see anything which tends to suggest the appeal will be successful.
13. Of course, this is not to say it will not be successful, that is a matter for the Court conducting the appeal. It is relevant in this application to suspend the Order to look at the merits of the case and see whether there is an arguable case. The appellant tenant simply states she wants more time to find another house before she vacates the premises. The time given to vacate was nine days longer than the Act specifies. In this case, 14 days was given where the Act says no more than five days should be given.
14. The case had been adjourned before the Commissioner for two months before the Order was made and I am satisfied that the tenant was given time during the adjournment period to resolve the question of the unpaid rent. It is not a matter for this Court as to whether it was appropriate for these adjournments to occur, the fact is they did occur and they were being sought by the tenant and they were to her advantage. She is now seeking to use s 152 of the *Residential Tenancies Act* to achieve a further delay, this time, a delay in the implementation of the Order of the Commissioner.
15. In my view, that is not an appropriate way to exercise the discretion contained in s 152(1) of the *Residential Tenancies Act*. The merits of the appeal cannot be ignored. The fact that the tenant consented to the Order is a significant factor here. That is a factor which impacts on whether the suspension of the Order is allowed. This is the first time I have encountered a consent Order made before the Commissioner which is then appealed under the *Residential Tenancy Act*. The matter was stood down to allow me

some time to consider all the material and consider the effect the consent Order had on the question of the stay application.

16. In a final analysis, I find that the two factors which have been referred to above, in particular, the fact that the appeal has been lodged as a device to stay longer in the property and the fact that the tenant consented to the Order of the Commissioner, when combined with the fact that nothing can be pointed to which would mean there is an arguable appeal, mean that this is an inappropriate case to exercise the Court's discretion to suspend the operation of the Commissioner's Orders pending the determination of the appeal.
17. I will not interfere with the decision made on 30 October 2007 to suspend the operation of the Order until 10.00am on 2 November 2007, which was pending the decision on the stay application. The Order of the Commissioner to vacate the premises was effective from 30 October 2007. Had that Order not been made suspending until 2 November 2007, the application for suspension of the Order would have been rendered negatory in all the circumstances. I was of the view that the Court needed time to consider the case.
18. The application to suspend the operation of the Commissioner's Order of 16 October 2007 pending the determination of the appeal is refused and I order accordingly.

Dated this 1st day of November 2007.

Melanie Little
STIPENDIARY MAGISTRATE